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In the Supreme Court of the United States

OCTOBER TERM, 1959

Nos. 459, 473

Public Service Commission of the State of New York, *Petitioner*,

v.

Federal Power Commission, *Respondent*.

The United Gas Improvement Company, *Petitioner*,

Philadelphia Electric Company, *Petitioner*,

v.

Federal Power Commission, *Respondent*.

Pan American Petroleum Corporation, Atlantic Refining Company, Cities Service Production Company, Humble Oil & Refining Company, Ohio Oil Company, Oil Participations Incorporated, Tidewater Oil Company, Transcontinental Gas Pipe Line Corporation, Continental Oil Company, Magnolia Petroleum Company, Pure Oil Company, Sun Oil Company, Union Oil Company of California, W. H. Hunt, Trustee for Hassie Hunt Trust, Phillips Petroleum Company, *Intervenor Respondents*.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

Motion of People of the State of California and the Public Utilities Commission of the State of California for Leave to File Brief Amici Curiae

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SUBJECT INDEX

	Page
The Interest of the State of California	2
Proposed Projects to California	3
Transwestern Pipeline Company	3
The Rock Springs Project	3
The Pacific Gas Transmission Company	3

TABLE OF AUTHORITIES

CASES

	Pages
In the Matter of Transwestern Pipeline Company, et al., Docket No. G-14871—Federal Power Commission	3
In the Matters of El Paso Natural Gas Company, Pacific Northwest Pipeline Corporation, Colorado Interstate Gas Company, Docket Nos. G-16235, et al.—Federal Power Commission	3
In the Matters of Pacific Gas Transmission Co., Pacific Northwest Pipeline Corp., The Montana Power Co., Docket Nos. G-17350, et al.—Federal Power Commission	3

STATUTES AND RULES

Rule 42; Rules of the Supreme Court	1
California Public Utilities Code, Section 307	2

CONSTITUTIONS

Article XII, California Constitution	1

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The People of the State of California and the Public Utilities Commission of the State of California (created by Article XII of the California Constitution), through its Attorney and Chief Counsel, pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States, respectfully move for leave to file, in the above-entitled case, their brief amici curiae, annexed hereto, which supports the position of the petitioners herein.

The undersigned Attorney and Chief Counsel for the Public Utilities Commission of the State of California is charged with the duty and responsibility of representing and appearing for the People of the State of California and the Public Utilities Commission of said State in all matters concerned with public utility regulation (Section 307, California Public Utilities Code, formerly Section 4 of the Public Utilities Act).

Said Public Utilities Commission exercises exclusive jurisdiction over all public utility regulatory matters, including the regulation of rates and service of gas utilities furnishing either natural or manufactured gas to the consumers of California.

THE INTEREST OF THE STATE OF CALIFORNIA

California is concerned with this cause. California gas distributing utilities serve a population in excess of 15 million people. Approximately seventy per cent of the natural gas utilized in California comes from out-of-state sources. Presently the sole out-of-state supplier of natural gas to California is the El Paso Natural Gas Company, which is subject to the jurisdiction of the Federal Power Commission.

Of direct concern to the public of California is the issue in this case relating to the imposition of price conditions attendant upon the issuance of a certificate of public convenience and necessity by the Federal Power Commission. The interest of California in an adequate supply of natural gas at a just and reasonable price has been the subject of administrative litigation by this Commission over many years before the Federal Power Commission. Our problems are real, not academic.

PROPOSED PROJECTS TO CALIFORNIA

California's population and industrial growth require annual additions of natural gas from out-of-state sources. Presently three pipeline projects are in various stages before the Federal Power Commission. To demonstrate the absolute necessity for restoring meaning on behalf of consumers to the original CATCO decision, we shall here discuss briefly the natural gas pipelines which are proposed to be constructed to supply natural gas to California.

Transwestern Pipeline Company.[1]

The Federal Power Commission has authorized Transwestern Pipeline Company of Houston, Texas, to construct a new $191,700,000 system in the southwestern United States to supply 300,000,000 cubic feet of natural gas daily to markets in Southern California.

The Rock Springs Project.[2]

The El Paso Natural Gas Company proposes to build and has made application to construct a pipeline from the State of Utah to the Southern California border, at a cost of $77,896,000, to deliver 470,000,000 cubic feet of natural gas daily to the California market.

The Pacific Gas Transmission Company.[3]

The Pacific Gas Transmission Company has made application to the Federal Power Commission to construct

1. *In the Matter of Transwestern Pipeline Company, et al.*, Docket No. G-14871 Federal Power Commission.

2. *In the Matters of El Paso Natural Gas Company, Pacific Northwest Pipeline Corporation, Colorado Interstate Gas Company*, Docket Nos. G-16235, et al. Federal Power Commission.

3. *In the Matters of Pacific Gas Transmission Co., Pacific Northwest Pipeline Corp., The Montana Power Co.*, Docket Nos. G-17350, et al. Federal Power Commission.

a pipeline from the Province of Alberta in Canada across the international border, through the States of Idaho, Washington, and Oregon, to the northern border of California. This proposed pipeline is designed initially to transport 414,000,000 cubic feet per day at a cost of $337,765,000.

The total investment in these projects is $697,361,000. The total gas supply delivered is 1,184,000,000 cubic feet per day. Presently California consumes so much natural gas that it has been stated that an increase of one cent per mcf. in the cost of imported gas increases the annual natural gas bill of California by approximately $7,000,000.

The interest of California in this proceeding is vital. We are submitting this brief on behalf of California consumers to urge that the Supreme Court re-assert what we conceive to have been its intention in enunciating the CATCO doctrine.

Respectfully submitted,

WILLIAM M. BENNETT
Chief Counsel
Attorney for the People of the State of California and the Public Utilities Commission of said State

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SUBJECT INDEX

	Page
Statement of Interest	1
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement	3
Summary of Argument	3
Argument	3
A Discussion of the Decision of the Court of Appeals for the Third Circuit	4
Conclusion	6

Table of Authorities

Cases	Pages
Atlantic Refining Co., et al. v. Public Service Commission of the State of New York, 360 U.S. 378 (1959)	3, 4, 5, 6

Statutes

28 U.S.C. § 1254(1) (1952)	2
Natural Gas Act, 52 Stat. 831 (1938):	
Section 19(b)	2
Section 7	2
15 U.S.C.:	
Section 717r(b) (1958 ed.)	2
Sections 717-717w (1958 ed.)	3

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STATEMENT OF INTEREST

The interest of the People of the State of California and the Public Utilities Commission of said State in this cause is fully set forth in the motion preceding this brief.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Third Circuit, concerning which review is sought, is not yet reported. The opinion of the Federal Power Commission (R. 481-555) is reported at 20 FPC 264 (1958); the Commission's

order denying rehearing (R. 602-610) is reported at 20 FPC 571 (1958).

JURISDICTION

The judgment of the Court of Appeals was entered on August 4, 1959. An order denying rehearing was entered on September 9, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1952) and Section 19(b) of the Natural Gas Act, 52 Stat. 831 (1938), as amended, 15 U.S.C. § 717r(b) (1958 ed.).

QUESTIONS PRESENTED

1. Whether the requirement for "a most careful scrutiny and responsible reaction to initial price proposals of producers"* was satisfied in a certificate proceeding under Section 7 of the Natural Gas Act, in which the Federal Power Commission required no justification of the producers' initial prices but relied instead on the purchases having been made at "arms length," at the top of current unregulated market prices, by a pipeline which needed the gas for purposes of its own expansion and passed on the increased costs by raising its rates?

2. Whether the Commission's authority to issue conditioned certificates is circumscribed by its ability to determine, in the certificate proceeding, the reasonableness of a conditioned rate?

3. Whether a determination made by the Commission that producer certificates should issue without condition before enunciation by this Court of the requirement set forth in 1, above, necessitated reconsideration by the Commission in the light of that decision, or whether the Court below could itself make the reconsideration?

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*Atlantic Refining Co., et al. v. Public Service Commission of the State of New York, 360 U.S. 378, 391 (1959), hereinafter referred to as the CATCO decision.

STATUTE INVOLVED

Natural Gas Act, 52 Stat. 821 (1938), as amended, 15 U.S.C. §§ 717-717w (1958 ed.).

STATEMENT

The State of California adopts as its statement that which appears in the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit as filed by the United Gas Improvement Company and the Philadelphia Electric Company, petitioners herein.

SUMMARY OF ARGUMENT

The question here presented is whether or not the Circuit Court construed correctly the decision of this Court in the Atlantic Refining Company case. It is the opinion of the amici that the Court placed an improper, narrow construction upon the CATCO decision. It is the opinion of the amici that the Circuit Court opinion has, for practical purposes, destroyed the beneficial effect of the CATCO decision. It is the opinion of the amici that the Supreme Court in the CATCO case was enunciating a policy which required more than a consideration and rejection by the Federal Power Commission of the price factor.

ARGUMENT

The United States Court of Appeals for the Third Circuit in the instant decision concerning which review is sought did not correctly apply the CATCO doctrine. In the CATCO decision the Supreme Court admonished the Federal Power Commission to decide certificate cases after giving careful consideration to the question of price. It placed the question of price squarely within the concept of public interest. The Court pointed out that the Natural Gas

Act furnishes a comprehensive and effective regulatory scheme. The Court in the CATCO decision noted that without a price condition, rates later determined to have been excessive have been paid beyond recall by the public.

The total meaning of the CATCO decision, as we read it, requires more than full consideration and rejection of the price factor. As we read CATCO, it makes mandatory a price condition if, under any reading of the record, the public interest would be adversely affected by not inserting such. We also wish to point out to this Court that the public interest and necessity for price protection are never defeated by the contention that the gas must be sold or acquired at any price—else it will be lost. Obviously, this latter line of reasoning would destroy any or all price conditions if logically pursued.

A Discussion of the Decision of the Court of Appeals for the Third Circuit.

Factually, there is a great similarity between the record made before the Federal Power Commission which was the subject of the opinion by the Court of Appeals for the Third Circuit and the record before the Commission in the CATCO case. In CATCO, the authorized price created a new price level. In the present case the trial examiner found "that these prices are materially higher than the levels involved in Transco's prior purchases or existing contracts."

Despite many issues or factual matters having a similarity between the two cases, the Circuit Court construed the CATCO decision as merely requiring agency consideration of the price factor. We are quick to point out, however, that while it certainly requires full consideration of the price factor, it requires full consideration in the light of the public interest and in the light of what is just and

reasonable under the Natural Gas Act. The lower court has chosen to equate the administrative duty to that of a court of equity. This is an inexact comparison. It is not valid.

The vast responsibility of this agency; the public need for natural gas; the pipeline investments; the producer problems; the national dependence upon this valuable natural resource all of these factors make this somewhat more than an unspecified problem in a court of equity. Historically and beyond dispute, the Natural Gas Act was passed to protect consumers from exploitation. The question of prices is inseparable from the problem of exploitation. This agency in the public interest is required to apply the public interest as a first standard, and its duty is more articulate than the Circuit Court indicated when it described the administrative determination as involving "an exercise of judgment."

The exercise of judgment which is dictated by the Natural Gas Act and by the decisions of this Court is more specific than appears in the present decision. We submit that the instant decision is incorrect as a matter of law, whether viewed from the language of the Supreme Court in the CATCO decision or whether judged in light of the standards of the Natural Gas Act and the court decisions construing it.

This cause should be remanded to the Federal Power Commission for further consideration. Circuit Judge Hastie in his dissenting opinion stated:

> "Certainly the Atlantic Refining case indicates an approach and emphasizes considerations which might well have led the Commission to a different result, with or without further inquiry as to reasonable rates, in the cases now before us. To me that conclusion is a sufficient reason for sending these cases back to the Commission for re-examination."

In the CATCO decision, the Supreme Court stated that price was a "consideration of prime importance." This language means more than was attributed to it by the lower court opinion. In practical effect and operation, unless the instant decision is clarified, the CATCO decision, so far as consumer interest is concerned, loses all meaning. The protections we thought had been re-asserted by the Supreme Court have now been rationalized into a nullity, and perhaps consumers are worse off than if CATCO had never been decided. As the Circuit Court opinion now construes the Natural Gas Act and the question of price, as it affects the public interest, any administrative determination as to price is proper and lawful—or will be held such on appeal—so long as the agency, through suitable findings, makes it known that it gave some consideration to price.

CONCLUSION

We submit that price inevitably is a key issue in certificate cases. The fact that the Natural Gas Act does not permit reparations is a cogent argument in favor of price conditioning. The continued expansion of natural gas facilities and particularly as it affects California consumers, requires that price protections be imposed. Absent a modification or clarification of the instant decision, price controls, practically speaking, no longer exist except at the largesse of the agency. We submit that the Natural Gas Act makes mandatory, the imposition of price controls in the instant case.

Respectfully submitted,

WILLIAM M. BENNETT
Chief Counsel

Attorney for the People of the State of California and the Public Utilities Commission of said State.

Certificate of Service

I hereby certify that I have this day served the foregoing document upon the following parties by the United States mails, air mail, postage prepaid.

Dated: San Francisco, California this 29th. day of October, 1959.

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